

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 88-6

Date issued: February 22, 1988

Requested by: M K. Heidi Heitkamp, Tax Commissioner

- QUESTION PRESENTED -

Whether a city may adopt an ordinance requiring bars and lounges, regardless of whether they serve prepackaged food, to collect the city lodging and restaurant tax provided in N. D. C. C. ' 40-57.3-01.1.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that a city may not adopt an ordinance requiring bars and lounges, regardless of whether they serve prepackaged food, to collect the city lodging and restaurant tax provided in N. D. C. C. ' 40-57.3-01.1.

- ANALYSIS

N. D. C. C. ' 40-57.3-01.1 provides, in relevant part, as follows:

40-57.3-01.1. City lodging and restaurant tax - Imposition - Amount - Disposition - Referral. . . . [T]he governing body of any city may, by ordinance, impose a city tax, at a rate not to exceed one percent . . . upon the gross receipts of a restaurant from any sales of prepared food or beverages, not including alcoholic beverages for consumption off the premises where purchased, which are subject to state sales taxes. For purposes of this section, "restaurant" means any place where food is prepared and intended for individual portion service for consumption on or off the premises and "prepared" includes heating prepackaged food. Accommodations, food, and beverages may all, each or in any combination be subjected to the tax under this section, if all items in any category which are taxable under state law are taxable . . .

N. D. C. C. ' 40-57.3-01.1 clearly imposes the tax upon restaurants which are defined to be establishments serving prepared food, and prepared food includes heating of prepackaged foods. Therefore, a bar which, for example, heats prepackaged sandwiches, frozen pizza or similar items for its customers is subject to the tax, while a bar which only serves prepackaged potato chips and other snacks is not. Thus, the language of the statute states that a city may only adopt an ordinance which subjects establishments serving prepared food to the tax in N. D. C. C. ' 40-57.3-01.1.

ATTORNEY GENERAL' S OPINION 88-6  
February 22, 1988  
Page 2

- EFFECT -

This opinion is issued pursuant to N.D.C.C. ' 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

Nicholas J. Spaeth  
Attorney General

Assisted by: Carla J. Smith  
Assistant Attorney General

ja